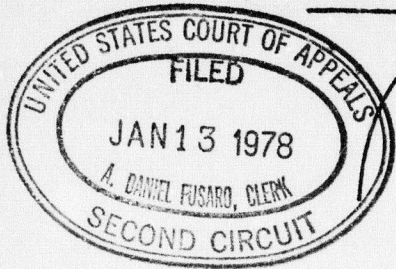


***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**



7-6200

To be argued by
PAUL LEWIS

UNITED STATES COURT OF APPEALS

for the
SECOND CIRCUIT

B PLS

Justin F. Latona, d/b/a J.F. Latona Construction Co., Inc.,

Plaintiff,

v.

G-Lam Corp., The Committee for Economic Improvement of Essex County, Inc. (CEI),
the People of the State of New York and U.S. Community Services Administration (CSA)
formerly known as U.S. Office of Economic Opportunity,

Defendants.

U.S. Community Services Administration,

Defendant-Appellee,

v.

G-Lam Corporation,

Defendant-Third-party Plaintiff-Appellant.

G-Lam Corporation,

Plaintiff,

v.

International Telephone & Telegraph Corporation, Town of North Elba, New York and
Robert Brodsky,

Defendants.

On Appeal from a Judgment of the United States District
Court for the Northern District of New York

BRIEF FOR DEFENDANT- THIRD-PARTY PLAINTIFF-APPELLANT

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Statement of Issues
Presented for Review

1. Is it error for the Court to dismiss a claim against the United States for lack of subject matter jurisdiction on the ground that claims made by third-party beneficiaries are not cognizable under the Tucker Act (28 U.S.C. §§1346 and 1491)?
2. Is it error for the Court to dismiss a claim without considering whether it impliedly states an alternative cause of action?
3. Can a memorandum of law be deemed a motion to amend a pleading, and if so, is it error for the Court to dismiss a claim without deciding the motion to amend?
4. Is it proper for the Court to remand a case before the predicate of Federal jurisdiction has been completely dismissed from the case?

Statement of the Case

The Project

This litigation arose out of a project to install a refrigeration system on the lower one-half mile of the Mt. Hoevenberg Bobsled Run in Lake Placid, New York. The purpose of the project was to avoid reliance on natural climate for maintaining proper conditions on the run insuring continuous use and a longer season. The refrigeration system would modernize the run for its use during the World Olympics which will take place in Lake Placid in 1980, and for practice and preliminary competition by American teams preparing for the Olympics.

In 1975, G-Lam entered into a contract with the Committee for Economic Improvement of Essex County, Inc. (CEI) for the purpose of designing and supervising the construction of the Bobsled Run Project. The total price of this contract was \$402,171. G-Lam was informed that the project was to be funded by the United States, through its Community Services Administration (CSA), and the State of New York, and that the U.S. and the State of New York would monitor all the contractual arrangements, and the performance of the project.

G-Lam engaged various subcontractors to perform the details of the project. The most important of these was ITT, which agreed to supply the material and the refrigeration system, the design of which they also undertook to prepare.

Throughout 1975, work on the project proceeded in an orderly manner. At all times, the U.S. and the State of New York continued to monitor and supervise the project, and to fund the progress payments made by CEI. In December, 1975, however, CEI suspended work on the project until the Spring, citing the Winter weather as its reason. Subsequently, however, CEI refused to pay G-Lam a \$100,000 progress payment which was due in December, 1975. As a result, G-Lam was unable to pay its subcontractors.

In the Spring of 1976, CEI refused to resume work on the project, and in May, 1976, revealed for the first time that it did not have the funds to pay for the project. Consequently, various subcontractors filed liens against CEI.

The Parties

G-Lam is a New Jersey corporation, which performs, among other things, construction management and related services.

It was retained for the project by CEI in a contract executed by the parties in the Spring of 1975.

CEI is a non-profit corporation essentially funded by government agencies including CSA and the State of New York. CSA is a U.S. agency and one of the initiating parties of this project. It was the prime source of funds for CEI. Its employees and representatives reviewed CEI's contracts, initiated meetings and conferences, passed on their retention of companies and personnel for the project and monitored and supervised the project.

The State of New York, through its Department of Environmental Conservation, is a permittee or licensee of the Town of North Elba from whom the State of New York obtained the right to use the property upon which the Bobsled Run was built for the 1932 Olympics.

ITT is the supplier of the refrigeration equipment. It is also the designer of the project and provided the engineering services relating to the project. Robert Brodsky was retained by ITT to prepare the plans for ITT.

Latona Construction Co. is a subcontractor to G-Lam. It provided the labor required for installing the concrete for the run. Latona, in turn, had other lower-tier subcontractors who performed additional labor on the project and furnished concrete supplies.

The New York Action

In October, 1976, Latona commenced a lien foreclosure against CEI, G-Lam, CSA (United States) and the State of New York in the Supreme Court of Essex County, New York (p. 3a). This action was then removed to the U.S. District Court, Northern District of New York, by CSA pursuant to 28 U.S.C. §§1441(a) and 1442(a)(1), p. 9a-13a.

CEI failed to answer the complaint, and in November, 1976, Latona received a default judgment against CEI. CEI reportedly has paid Latona \$20,000 in consideration of a release from the judgment. None of the other defendants consented to (or knew of) this payment, however, and G-Lam contends that this payment should be held in trust for all subcontractors under the New York Lien Law, because of, among other things, the Rule requiring parity among lienors.

G-Lam cross-claimed against CEI, CSA (United States) and the State of New York for their failure to make their agreed payments and for the unjustified suspension of the project. G-Lam also cross-claimed against CEI for violation of the New York Lien Law, and added ITT and the Town of North Elba (which owned the property on which the Bobsled Run is located) as necessary and indispensable parties (p. 16a).

In January, 1977, CEI sent G-Lam a notice of termination of their contract (p. 39a) and a demand for arbitration for G-Lam's alleged breaches. CEI also moved to stay proceedings pending arbitration. G-Lam opposed this motion and cross-moved to stay arbitration. Neither of these motions has been decided by the Court.

In March, 1977, at a meeting of all the parties in Lake Placid, CEI supplied the details of its claims against G-Lam, stating that the systems had been poorly and negligently designed, and that the equipment was unworkable and was delivered late. Since ITT was responsible for the design, manufacture and delivery of the refrigeration system, G-Lam immediately moved to amend its pleading, adding these claims against ITT (p. 30a). ITT moved to dismiss this action against it. Neither of these motions has been decided by the Court.

In April and June, 1977, the Court heard argument of the various motions then pending, but reserved decision in the hope that the parties would be able to settle the matter. The Court did, however, decide a motion to dismiss brought by CSA (United States). The Court granted the motion (p. 77a).

Legal Argument

I.

The Court Below Erred By Ruling That the Courts Have No Juris- diction Over Claims Against the United States Made by Third-Party Beneficiaries

G-Lam recognizes that the District Court can reject jurisdiction over G-Lam's claims against the United States because the amount in controversy exceeds the \$10,000 limitation set forth in 28 U.S.C. §1346(a)(2). However, Judge Foley's decision went far beyond this issue; he also held that the United States Courts have no jurisdiction over claims made by third-party beneficiaries against the United States, see opinion of Judge Foley in Latona v. G-Lam, et. al., 76-CV-436, pp. 86a-87a. This aspect of Judge Foley's decision has placed G-Lam in a precarious legal position and is the source of its appeal.

G-Lam is filing a petition in the U.S. Court of Claims seeking damages, which G-Lam alleges were caused by CSA's breach and abandonment of its contract with CEI. Without this appeal, the decision below may very well subject G-Lam to a dismissal of its Court of Claims action on the basis of res judicata, even if the decision below was overbroad and an inaccurate statement of the law, as G-Lam contends.

Judge Foley seems to state that no third-party beneficiary has a cognizable claim against the United States. However, the Courts have long recognized that under the appropriate circumstances, third-party beneficiaries can assert claims directly against the United States, Maneely v. U.S., 68 Ct. Cl. 623, 629 (1929); U.S. v. Huff, 165 F. 2d 720, 723 (5th cir., 1948); Deltec Corp. v. U.S., 326 F. 2d 1004 (Ct. Cl., 1964); Hebah v. U.S., 428 F. 2d 1334, 1338-39 (Ct. Cl., 1970). The real issue is whether the factual context of this case presents such an appropriate circumstance, an issue which was completely ignored by the decision below, and on which the Court prematurely ruled.

The Court did not examine any facts or make findings on the jurisdictional issue, or allegations thereto by the claimant. The government supplied no facts that would negate the existence of such a contract. The government's motion was styled as a motion to dismiss and motion for summary judgment and would be considered to take on the latter form, in any event, because of the need to introduce facts outside the pleadings. In those situations, the movant has the burden of proof, and all inferences must be drawn against the movant and in favor of the party opposing the motion, e.g., U.S. v. Diebold, Inc., 369 U.S. 654 (1962); Sterling Nat'l. Bank & Trust Co. v. Fidel. Mtg. Investors, 510 F. 2d 870 (2d cir., 1975).

The cases clearly indicate that the United States may by contract give rights to third parties which the third parties can enforce directly against the United States, even in the absence of privity of contract between the United States and the third party. For example, in Maneely v. U.S., supra, the Court of Claims held that a subcontractor could assert a claim against the United States on the basis of a contract between the United States and the prime contractor. Similarly, in U.S. v. Huff, supra, the Fifth Circuit, sitting as the Court of Claims, held that a contract between the U.S. and a landowner gave tenants of the land enforceable rights against the U.S. And, in Deltec Corp. v. U.S., supra, the Court of Claims recognized that the U.S. could by contract designate a prime contractor and his subcontractors as agents of the U.S., thus permitting subcontractors or even sub-subcontractors to assert claims directly against the U.S.

In the case at bar, CSA never produced its contract with CEI to either G-Lam or the Court. Thus, it was impossible to determine whether or not G-Lam possesses any enforceable rights under it.

In addition, even if the face of the contract does not provide G-Lam with any enforceable rights against the U.S.,

the government's actual course of dealing with the parties may have done so, see Deltec Corp. v. U.S., supra. The determination of this issue, however, requires an extensive revelation of the facts, as was done in the Deltec case. This was not done by the Court below, and as a result, it could not have adequately considered this issue.

Finally, assuming arguendo that neither the contract nor the government's course of dealing provide G-Lam with enforceable rights, it remains to be decided whether Hebah v. U.S., supra, will be followed in actions brought by persons like G-Lam, who contract with grantees of the Federal government.

In Hebah, the Court of Claims denied the government's motion to dismiss an action brought by an individual Indian against the United States on the basis of a treaty between his tribe and the United States. The Court utilized a contract law analysis, and held that the plaintiff was a third-party beneficiary of the treaty. In so doing, the Court used a broader and more flexible standard for determining when third-party beneficiaries can sue the U.S. directly than it had in previous cases. As a result, any "intended beneficiary" can bring an action against the United States, because "recognition of his rights is appropriate to effectuate the intention of the

[contracting parties]", 428 F. 2d 1338.

The Court below relied on Housing Corporation of America v. U.S., 468 F. 2d 922 (Ct. Cl., 1972), where this issue was first raised by a contractor of a government grantee. But the Court of Claims did not decide the case on this issue. The Court held that HUD's contract with its grantee expressly barred third-party claims, except those brought by bondholders, and that the plaintiff was not a bondholder. It also distinguished Hebah on the ground that the government had not breached or in any way failed to live up to its contract with its grantee and that Hebah could only be applicable where the plaintiff alleged such a breach.*

Unlike Housing Corp. of America, G-Lam is alleging that the government breached and abandoned its contract with its grantee, CEI, and G-Lam's claim is for approved work which has already been completed. Thus, Housing Corp. of America does not foreclose any of the arguments that G-Lam has.

G-Lam recognizes that it is by no means certain that Hebah will be followed. However, it is an important and

*In Housing Corp. of Am., the government fully funded the project and the plaintiff was paid all the moneys which were owing to him on the contract. Plaintiff's claim was for unapproved changes for additional work.

undecided issue of Federal law whose implications extend far beyond this particular case. As such, it merits a close and detailed examination by the Courts, and not the cursory and superficial examination given to it by the Court below.

Since the District Court does not have jurisdiction over this Tucker Act claim, G-Lam is not requesting that this Court reverse and remand the case. G-Lam does, however, request that the decision below be reversed with respect to the third-party beneficiary basis of that decision. This will permit G-Lam to pursue its claims against the United States in the Court of Claims and will permit that Court to render a decision on the merits of the case after full disclosure of all of the relevant information.

II.

G-Lam Has Stated A Cause of Action Under the Administrative Procedures Act

Although G-Lam has admitted that the District Court does not have jurisdiction over its Tucker Act claim (because the claim is in an amount in excess of \$10,000), G-Lam's complaint also states a cause of action under the Administrative Procedures Act (APA) 5 U.S.C. §701, et. seq., and thus, the District Court erred in dismissing the complaint.

5 U.S.C. §702 states:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

The APA has been held to be a waiver of sovereign immunity by the United States, Kletschka v. Driver, 411 F. 2d 436, 445 (2d cir., 1969); Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 859 (D.C. cir., 1970); and the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S. Ct. 1507 (1967) has held that all agency action is subject to judicial review unless a statute clearly and unequivocally precludes such review.

G-Lam contends that the governmental agencies and personnel have abused their discretion, acted in an arbitrary and capricious manner and failed to abide by their statutory duties in their administration and oversight of the Bobsled-Run Project and their cut-off of funding for that project. (See G-Lam's Answer, Counterclaim, Crossclaim and Third-Party Claim, p. 16a; proposed Amended Answer, Counterclaim, Crossclaim and Third-Party Claim, p. 41a; and Reply Memorandum in Opposition to Government's Motion to Dismiss, p. 63a).

As a result, G-Lam claims that it has suffered direct economic injury, which is undoubtedly an "injury in fact" to "an interest arguably within the zone of interests to be protected or regulated", Data Processing Service v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); Sierra Club v. Morton, 405 U.S. 727, 733 (1971); Citizens Comm. for Hudson Valley v. Volpe, 425 F. 2d 97 (2d cir., 1970); and thus has standing to bring an action in the District Court.

Despite these serious allegations concerning the government's conduct and the impact of that conduct on G-Lam, the Court below, in its opinion, made no reference at all to this aspect of G-Lam's claim and apparently did not even consider it. This claim raises many substantial issues of fact and should not

have been dismissed at such an early stage of the proceedings, even before either side has had the opportunity to engage in any discovery.

While it is true that neither G-Lam's original nor proposed amended pleading specifically refers to the APA, this is not sufficient of itself to warrant a dismissal. Pleadings must be construed liberally and ambiguities must be resolved in favor of the pleading, Friends of the Earth v. Carey, 535 F. 2d 165, 176 (2d cir., 1976); International Controls Corp. v. Vesco, 490 F. 2d 1334, 1351 (2d cir., 1974) cert. den. 417 U.S. 932, 94 S. Ct. 2644 (1974); Bowman v. Hartig, 334 F. Supp. 1323, 1326 (S.D. N.Y., 1971).

Even if G-Lam's pleadings do not state a cause of action under the APA, its Reply Memorandum in Opposition to Government's Motion to Dismiss (p. 63a) certainly should have been considered as a motion to amend the pleading pursuant to Fed. R. Civ. Pro. 15(a). Amendments to pleadings are to be freely granted so as to permit decisions on the merits and not on the technicalities of pleading, Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227 (1962); Clay v. Martin, 509 F. 2d 109 (2d cir., 1975); Roloff v. Arabian American Oil Co., 421 F. 2d 240 (2d cir., 1970). In order to give effect to this policy, the Courts have

entertained motions to amend pleadings even where not formally designated as such.

In International Brewers, Inc. v. Swed Distributing Co., 351 F. 2d 455 (5th cir., 1965), the Fifth Circuit held that a motion for rehearing should have been treated as a motion to amend. As a result, the Court vacated the judgment of dismissal below and remanded the case to the District Court for a reconsideration of the motion.

Similarly, in Roloff v. Arabian American Oil Co., supra, the District Court granted the defendant's motion for summary judgment even though it was based on an affirmative defense which had not been pleaded and the motion was brought two years after the action had been instituted. This Court held that the District Court had acted properly in treating defendant's motion as a motion to amend his pleading.

Finally, the District Court for the Southern District of New York has treated a supplemental memorandum of law in opposition to a motion to dismiss as a motion to amend, Tron v. Condello, 427 F. Supp. 1175 (S.D. N.Y., 1976). The statute upon which plaintiff was basing his argument was not mentioned in his pleading and was only alluded to without citation in his

memorandum in opposition to the motion.

G-Lam's situation in the case at bar is indistinguishable from that of the parties in the aforementioned cases, and thus its Reply Memorandum should have been treated by the Court as a motion to amend.

It may be argued that the Court below may have treated the Reply Memorandum as a motion to amend, and that in dismissing the crossclaim, it also dismissed the motion to amend. Judge Foley, however, did not expressly address this issue in his opinion, and it should not be presumed that he did so by implication where important rights are at stake.

In any event, the Supreme Court has addressed itself to this problem in Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, wherein it stated:

"...[O]utright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

Thus, since the Court below did not set forth any reason for denying the motion to amend (if it in fact did so), that

decision cannot stand.

Accordingly, G-Lam should be granted leave to file an amended complaint against the Federal defendant, see Vanity Fair Mills v. T. Eaton Co., 234 F. 2d 633, 647-48 (2d cir., 1956); or, at a minimum, a motion to amend, see Moviecolor Ltd. v. Eastman Kodak Co., 288 F. 2d 80, 88 (2d cir., 1961).

III.

The District Court's Remand of the Case to the New York Courts Was Improper

The decision of the Court below to remand this case was based upon the fact that the Federal defendant had been dismissed. With the predicate for Federal jurisdiction eliminated, the Court saw itself as being presented with only state law issues.

However, as set forth above, the Court's dismissal was erroneous, or, at best, premature. Thus, the entire underpinning of the Court's decision has now been eliminated, and as a result, should not be permitted to stand.

There is no question that when a U.S. Court is presented with both Federal and state claims, and the Federal claims are dismissed or otherwise disposed of, the Court can retain jurisdiction over the state claims, Rosado v. Wyman, 397 U.S. 397 (1970), 90 S. Ct. 1207 (1970); Gem Corrugated Box Corp. v. National Kraft Container Corp., 427 F. 2d 499 (2d cir., 1970); Ryan v. J. Walter Thompson Co., 453 F. 2d 444 (2d cir., 1971); Murphy v. Kodz, 351 F. 2d 163 (9th cir., 1965); Watkins v. Grover, 508 F. 2d 921 (9th cir., 1974). A fortiori,

where the Federal claims remain active, the Court must retain jurisdiction.

More importantly, a case such as this, which involves a complex series of related transacitons among a number of parties, would seem to be the very type of case where the Court should retain jurisdiction of the state claims

The Courts are presented with an analogous problem where removal is based on 28 U.S.C. §1441(c) and they have to decide whether or not to remand the state law claims. The relevant considerations in making this determination were set forth in Baltimore Gas & Electric Co. v. United States Fidelity & Guaranty Co., 159 F. Supp. 738, 741 (D. Md., 1958):

"But in some cases, as in this, the similarity of the issues, arising out of the same or related transactions and incidents, the convenience of parties and witnesses and the importance of conserving the time of judges, juries, and other court officials, all point to the desirability of a single trial."

See also Breslerman v. Am. Liberty Ins. Co., 169 F. Supp. 531 (E.D. N.Y., 1959).

The same circumstances are present in the case at bar.

The only way that multiple and duplicative proceedings can be avoided is if the entire case is litigated in one forum. The only forum where this can be accomplished is the Federal Court, since it has exclusive jurisdiction over G-Lam's claim under the APA.

Furthermore, the District Court would also have diversity jurisdiction had it realigned the parties into their proper positions. The Supreme Court in City of Indianapolis v. Chase Nat. Bank, 314 U.S. 63, 69, 62 S. Ct. 15, 17 (1941) stated:

"Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who are defendants. It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings, and arrange the parties according to their sides in the dispute.' Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interest' exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit' and the 'primary and controlling matter in dispute'". (citations omitted)

In applying these principles to the case at bar, it is apparent that the crux of the dispute is the nonpayment of money by the entities who are funding and/or administering the project, to wit, CEI, a citizen of New York, CSA and the State of New York. The recipient of these funds is G-Lam, a

citizen of New Jersey.

It is true that there is a collateral dispute between G-Lam and Latona, who is also a New Jersey citizen. But this dispute concerns the amount of money which Latona has a right to receive for the work performed under its subcontract with G-Lam. The sources of this money are CEI, CSA and the State of New York, and the amounts sought by G-Lam naturally include the amounts Latona is claiming. Thus, G-Lam should properly be aligned with Latona, and not adverse to it, since they are both seeking payment from the same fund of money.

Conclusion

For the reasons above, it is respectfully requested that the decision below be reversed with respect to the third-party beneficiary basis of that decision; that G-Lam be granted leave to file an amended complaint against the United States, or in the alternative, leave to file a motion to amend its complaint; and that the order of remand be reversed.

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